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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 955

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 933

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

YOUNGERMAN-REYNOLDS HARDWOOD COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW

The findings of fact, the opinion, conclusions of law and the judgment of the District Court denying the petition for injunction and dismissing the case appear in the record from pages 94 to 97.

The opinion of the Circuit Court of Appeals for the Fifth Circuit affirming the District Court appears in the record from pages 125 to 127. The opinion is reported at 145 F. (2); 349.

QUESTION PRESENTED

The only question presented by this record is whether the trial court abused its discretion in denying the petition for an order enjoining the defendant from future violations of the Fair Labor Standards Act.

STATEMENT

The plaintiff below, petitioner here, brought an action in the district court seeking an order enjoining the defendant, a company engaged in operating a lumber mill at Samson, Alabama, from future violation of certain provisions of the Fair Labor Standards Act (hereinafter referred to merely as the Act). The complaint was filed March 17, 1943. (R. 7).

Violations charged

The complaint charged the defendant with three violations of the Act; first, with reference to shipment of goods produced by certain suppliers where they, not the defendant, violated the act; second, the failure to keep proper records; and third, the payment of wages by the defendant in violation of sections relating to overtime.

At the beginning of the trial the plaintiff withdrew the charge with reference to the shipment of goods produced by suppliers, (R. 10) thus eliminating the first of these charges.

The district court found as a fact (R. 93): "There is not sufficient evidence that the defendant intentionally failed to keep adequate records." The petitioner makes no contention here in brief to the contrary. This would, therefore, seem to eliminate from the case the second of these charges.

This leaves only the charge with reference to overtime.

Two classes of workers

The mill had two classes of work. One was the mill work done on an hourly basis. All hourly paid mill workers were without dispute fully paid for all overtime. The other was the work of stacking lumber. Lumber stacking is common labor. It consists of the simple unskilled work of picking up boards and placing them in a stack. The custom in the lumber industry is to pay the stackers on a piece rate basis. Although common laborers, they make considerably more than other common laborers working on an hourly basis. For the most part they work independently of the other operations of the mill. The system is described by Youngerman, president of the defendant company, at page 78 of the record. The lumber goes through the mill and then to the green chain where hourly paid men take the lumber off, sort it and put it on various wagons or lumber dollies which are then moved away by hourly paid men to a place where the stacking is to be done. At that point hourly paid employees remove the lumber from the dollies and leave the lumber in separate piles. At this point the work of the hourly paid employees ceases and from that point on the stackers take over. They usually work on a piece rate basis of an agreed amount for each thousand of board feet stacked.

The stackers go to work when they choose, work as long as they want to, and stop when they get ready. Some of them start early in the morning before the mill starts and work in the cool of the morning. Later in the day when it gets hot they will often quit and come back later to do more stacking in the cooler afternoon hours. They quit work when it rains and virtually work when

and as they please. Although they are common laborers the nature of their work is such that they work without supervision and at such hours as they see fit.

When there is no stacking to be done, the stackers often work in the mill and are then paid on an hourly basis. The rate actually paid the stackers for mill work was, with some later exceptions, 35c an hour with one and a half times that amount for overtime. (Plaintiff's exhibit 1, R. 115-121).

Three inspections

Prior to the effective date of the Act the defendant company had been employing the stackers on the piece rate basis and continued to do so afterwards except during the year 1940 when they were put on an hourly basis and were paid time and a half for overtime but they became dissatisfied with this arrangement, threatened to quit and were changed back to the piece rate basis. (Finding 6, R. 95).

The company was inspected by representatives of the administrator on three occasions. In 1940 there was an inspection at which time the question of the piece rate pay basis arose and the inspectors told the company's president, Youngerman, that his piece rate pay system was all-right (R. 72). In 1941 there was a second inspection and again the inspectors told Youngerman his piece rate basis was satisfactory (R. 74). In the fall of 1942 there was a third inspection and it was then for the first time that Youngerman was told that his piece rate basis of paying stackers without extra pay for overtime hours was a violation of the law. (Finding 7, R. 95). There was then an abrupt end of overtime (R. 117) (Finding 7, R. 95) and from then on until the suit was

filed in March 1943 there was, with one minor exception,[1] no more overtime.[2]

When the suit was filed in March 1943 the *Rosenwasser* case had not been decided and the law had not been settled with reference to piece rate pay. This case was pending in court and the rights of all parties could be protected. The government was urgently calling for more lumber production in connection with the war effort and the company thereupon permitted the stackers to begin working overtime. But the amount paid, although figured on the piece rate basis, was paid not as final payment but as an advance. The books were held in suspense so that if it should be held that the company owed any additional amount for overtime it could be paid. (Finding 9; R. 96). These payments were thus handled on advice of counsel and in utmost good faith. The petitioner has conceded this fact.[3] That there was nothing objectionable about this *pendente lite* arrangement is indicated by the fact that although half a year elapsed between the filing of the suit and the date of trial petitioner made no effort to obtain a temporary restraining order against it.

The employment contracts

There were several pre-trial conferences (R. 9) at which petitioner's counsel insisted that the piece rate basis of pay without additional pay on an hourly basis for overtime hours was a violation of Section 7. The

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1 Clifton Holmes worked *one* hour overtime during the week ending October 10, 1942.

2 The 44 hours worked for the week ending October 31, 1942, by Clifton Holmes was four hours of overtime but was for mill work and was paid on an hourly basis with full overtime pay. (R. 117). The same is true of the 44 1/2 hour week of February 20, 1943, worked by Lorenza Poon, which was likewise paid on an hourly basis and overtime fully paid. (Plaintiff's exhibit 1, R. 115).

3 It is admitted in petitioner's brief (p. 3) on the original submission in the Circuit Court of Appeals that "These steps were taken in good faith and on advice of counsel."

defendant company would gladly have put them back on an hourly basis but the stackers were not willing to work on an hourly basis. In an effort to satisfy the requirements of the statute and also the wishes of the workers a plan was developed, on advice of counsel based upon the plan approved in the Belo case,[4] which provided for pay for overtime hours on an hourly basis at the rate at which they had been usually paid when doing work other than stacking (35c) and which at the same time gave the stackers an opportunity to earn even more than that amount by increased effort under a guaranty figured on a piece rate. Contracts were entered into with the three remaining stackers after being read and fully explained to them. The contracts provided as follows:

> "The basis or regular rate of pay is 35c per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:
>
> "The amount of stacking done by said employee shall be figured on the basis of 80c per thousand board feet of lumber for flat stacking and 70c per thousand board feet of lumber racked." (R. 108).

The 35c rate specified was the minimum hourly rate promulgated by the petitioner for the lumber industry in November 1941 (R. 14) and was also the rate usually paid when they were doing work other than stacking. (R. 115-121).

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4 *Walling v. Belo Corp.*, 316 U. S. 624.

Findings by the district court

The trial court found as a fact that

"The defendant in this case did not intentionally violate the law with reference to its stackers . . ." Finding 8; R. 96).

The district court stated:

"This court is aware of the fact that it is no proper function of a court to pass on the wisdom or lack of wisdom of any valid enactment of a law, and that it is the duty of the court when its processes are invoked to give effect to the law as it finds it to be. But at the same time where the injunctive power of the court is sought to be invoked there should be clear proof of an intentional purpose to circumvent or evade the law and unwillingness to conform to the law. The administrative agency of the government in administering the wage and hour law would make it more effective by showing employers how to observe the law and by helping them to interpret and understand the law where its provisions are not clear rather than by invoking the injunctive powers of the court in cases where there is no intention to disregard or evade the law.

"The individuals operating the defendant corporation in this case are laymen and are not skilled in interpreting and construing new laws. They no doubt reached the conclusion that under their arrangement with the lumber stackers they were paid wages which amounted to as much as or more than the minimum wage prescribed in the act with time and a half paid for all overtime and that as this arrangement was satisfactory to both the employer and the employee that they were acting

within the spirit and intention of the law that they were not required to pay any additional amount. In this conclusion, if the construction placed on the act by the administrator and some of the courts is right, the defendant was wrong. But in the opinion of this court it was not such wrong and there was not such intentional violation of the law resulting therefrom as to call for injunctive relief especially where there is evidence, as there is in this case, that the defendant has ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law."

The court declined to issue the injunction sought and dismissed the suit.

ARGUMENT

There was no abuse of discretion

The only relief sought by the plaintiff was an order enjoining the defendant from future violation of the Act.

Section 17 of the Act provides: "The district court . . . shall have jurisdiction *for cause shown* to restrain violation . . ." (emphasis supplied).

Rule 52 of the Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately conclusions of law thereof . . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

Except where a statute gives an absolute right, the granting or refusing of an injunction rests in the sound

discretion of the court.[5]

The power of courts to issue injunctions should be exercised sparingly and with great caution.[6]

These principles are recognized in the recent case of *Hecht Company vs. Bowles*, 321 U. S. 321, (decided February 28, 1944). There the Administrator under the Emergency Price Control Act of 1942 sought an injunction against a department store under Section 205 (a) of that Act which provided that "Upon a showing . . . a permanent or temporary injunction . . . shall be granted," to restrain violation of that act.

The question was stated by the court to be:

> "The question in this case is whether the Administrator, having established that a defendant has engaged in acts or practices violative of Section 4 of the Act entitled as of right to an injunction restraining the defendant from engaging in such acts or practices or whether the court has some discretion to grant or withhold such relief."

In that case the district court had found that the "mistakes in pricing and listing were all made in good faith and without intent to violate the regulations." It declined to issue the injunction and dismissed the case. On appeal, the Circuit Court of Appeals construed the Act to require the issuance of an injunction or other order as a matter of course once violations were found. On certiorari this court held that although "the cessation of violations, whether before or after the institution of a suit by the Administrator is no bar to the issuance of an injunction," that nevertheless the

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5 *Petroleum Exploration vs. Public Service Co.*, 304 U. S. 209, 218. *Harrisonville vs. Dickey*, 289 U. S. 334 at 337, 338.

6 "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction." *Truly vs. Wanzer, et al.*, 5 How. 142.

court did "not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks." This court held that ". . . if Congress had intended to make such a drastic departure from the traditions of equity practice an unequivocal statement of its purpose would have been made."

In discussing the general rules with reference to the injunctive processes of equity court, this court wrote as follows:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated, that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. Winter Haven, 320 U. S. 228, 235, ante, 1, 4, 64 S. Ct. 7. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each degree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjudgment and reconciliation between the public interest and private needs as well as between competing private claims."

The Court of Appeals was reversed and the case was remanded so that the Circuit Court of Appeals could determine whether the district court had abused its discretion in dismissing the complaint.

The principle there stated governs the case at bar. In that case, the defendant in good faith and unin-

tentionally had violated the provisions of a federal statute. Here, in 1942, prior to the inspection in the fall, the defendant company had worked the stackers some overtime weeks without additional pay for overtime hours and under the construction of the statute as eventually decided in the *Rosenwasser** case this was a violation of a federal statute but it had been done without intention to violate the law. There this court said that there was "no doubt . . . of the petitioner's good faith . . ." Here the district court found that "the defendant in this case did not intentionally violate the law . . ."

Among the cases where there had been unintentional violations of the act here involved and the courts have held no injunction necessary are:

Fleming v. Hoerman, d. b. a. Lyndon Broom Co., (DC Kan.; 1942) 6 Labor Cases Sec. 61283,

Fleming v. National Bank of Commerce of Charleston, (DC, W. Va.; 1943) 41 Fed. Supp. 833,

Walling v. T. Buettner and Co., (CCA-7; 1943) 6 Labor Cases Sec. 61, 445, February 11, 1943,

Walling v. John J. Casale, Inc., (DC N. Y.; 1943) 6 Labor Cases Sec. 61,524, March 26, 1943,

Fleming v. W. E. Lipshutz, d. b. a. Monarch Co., (DC Ga.; 1943) 6 Labor Cases Sec. 61,490, February 12, 1943.

Walling v. Emery Wholesale Corp., (DC, Ga.; 1943) Affirmed 138 F (2) 548,

Walling v. W. B. Pine, (DC, Okla.; 1942) 6 Labor Cases Sec. 61,189, June 24, 1942,

Fleming v. Phipps, 35 F. Supp. 627.

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* *U. S. vs. Rosenwasser*, 323 U. S. 360

The absence of any intention to evade the minimum wage requirements of the Act was clearly shown by the fact that the defendant company had at all times paid its stackers far in excess of the minimum. (See comparison, defendant's Exhibit 1, R. 106).

That the defendant company was not resorting to the piece rate basis of pay to avoid the overtime provision is shown by the fact that it was the stackers and not the company, who were insisting upon working on the piece rate basis and who were unwilling to work on an hourly basis.

Its good faith was indicated by the fact that the company although working the stackers on a piece rate basis where the pay was figured not by the hour but by the amount of lumber stacked had nevertheless, in an effort to fully comply with the law, kept an accurate hourly record during all the years since the act went into effect. Although the number of hours did not seem to have any bearing on the pay, the law required a record of hours worked and the company in order to comply did what must have seemed to be a useless thing and kept such a record.

Petitioner's brief indicates a clear misunderstanding of the facts in the case with reference to overtime weeks. The brief (p. 3) contains the following statement of fact:

> "Before the Act became effective and during most of the period thereafter, respondent employed and paid its stackers at agreed piece rates per thousand board feet. Each week it paid the same piece rates during overtime hours as during non-overtime hours of work. Thus, respondent made no provision for paying for overtime hours at one and one-half times the regular rate of pay as required by Section 7 (R. 95-96, fdgs. 6-7, 9)."

This statement would lead the court to believe that *during most of the period*, and each week thereof, since the Act became effective in 1938 that the company was working its stackers overtime hours without overtime pay. But that is not true. No evidence was offered by petitioner as to 1938 or 1939 but evidence was offfor the years 1940, 1941, 1942 and 1943 to trial date.[7] Petitioner *agreed* by stipulation (R. 113) that

> "... *during most of the year* 1940 *the stackers were ... put on an hourly basis and were paid time and a half for all overtime worked.*"
>
> (The district court so found. Finding 6, R. 95).

Petitioner further *agreed* by stipulation:

> "... *that during* 1941 *from January to May the stackers were not worked any overtime and from May to the end of the year there was little, if any, overtime worked.*"

The district court likewise so found. (Finding 7, R. 95). The district court also found that in 1942 prior to notification, out of 234 man weeks only 87 were overtime. (Finding 7, R. 95). It also found that from the fall of 1942 until the filing of the suit in March 1943 there was no overtime work. (Finding 7, R. 95, 96).

Petitioner's brief goes on in the next paragraph to state:

> "During 1942 more than one-third of the man-weeks worked involved overtime (R. 95, fdg. 7). In the fall of that year an inspector from the Wage and Hour Division notified respondent that its

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7 The tabulation of workers' hours and pay (R. 115-121) covers only 1942 and part of 1943 but the stipulation (R. 112) states that records for 1940 and 1941 were in evidence.

> method of employing the stackers violated the overtime requirements of Section 7 (*ibid.*). Respondent, however, did not alter its method of payment but, even after this action was commenced, continued to employ the stackers during overtime hours without compensating them at one and one-half times their regular rate of pay."

The statement that after the negotiations in the fall of 1942 "Respondent, however, did not alter its method of payment . . ." would again indicate that there were overtime weeks without overtime pay but the district court's finding in that respect, referred to immediately above, shows that overtime weeks stopped after the notification in the fall of 1942 and in addition to that petitioner's own Exhibit 1 (R. 115-121) shows no overtime weeks after September 26th of that year except for one isolated instance of one hour of overtime. The statement that the respondent did not alter its method of payment "even after this action was commenced" would indicate that the defendant had been and kept on working its stackers overtime weeks without overtime pay. But actually there had been no overtime weeks (with the one exception noted) during the fall, winter and spring months prior to the date the suit was filed (see plaintiff's Exhibit 1, R. 115-121, and Finding 7, R. 95) and the pay basis after the suit was filed was not found by the court to be a continuation of the former system of piece rate pay (even for non-overtime hours) but was found in effect to be a temporary, *pendente lite* system and that the pay was an advance with the books held in suspense so that if more pay was due it could be paid. (Finding 9, R. 96).

Arguments in a brief based upon statements which are not only in conflict with the finding of facts by

the trial court but are also with the agreed stipulation of facts not likely to be sound.

The court, in exercising its discretion, was not dealing with a case such as is indicated by the two quoted statements of fact in petitioner's brief but with a case where there had been virtually *no overtime piece rate weeks between the time when the Act became effective and the filing of the suit except a relatively few in* 1942 *which had stopped on notification and those few had been because of lack of understanding of a new law and not from intention to violate.* The overtime weeks after the suit was filed were found by the trial court to be on an advance of payment basis and were by admission of petitioner in brief made in good faith.

Therefore, on the facts up to the date the suit was filed and on through the *pendente lite* period and up until just before the contracts were signed on the day before the trial there was nothing up to that point to justify the issuance of an injunction and the sole remaining question is whether the signing of the contracts at that time made it an abuse of discretion for the trial court to decline to issue the injunction.

The circumstances existing at the time should be considered in this connection. The Administrator was insisting that the piece rate system without additional overtime pay figured on an hourly basis was a violation. A shift to the hourly basis would have been entirely satisfactory to the company and would have ended its troubles with the Administrator but the stackers would not work on that basis. They had been put on an hourly basis in 1940 and had threatened to quit unless put back on the piece rate basis. The company was in a position directly between the devil and the deep blue sea. The problem was to try to find a plan which would satisfy the requirements of the Act and be one under which

the stackers would be willing to work. The contracts were an effort to accomplish that result.

Section 7 of the Act provides in substance as follows:

> "No employer shall . . . employ any of his employees . . . for a work week longer than forty *hours* . . . unless such employee receives compensation for his employment in excess of the *hours* above specified at a rate not less than one and one-half times the regular rate at which he has been employed. (Emphasis supplied).

The general purpose of the Act was generally thought to be mainly to remove sweatshop conditions. Section 2 of the Act states: "The Congress hereby finds that the existence . . . of labor condtions detrimental to the maintenance of the *minimum standard of living* necessary for health, efficiency and general well-being of workers causes, etc." (Emphasis supplied). Section b declares the policy to be "to eliminate the conditions above referred to . . . without substantially curtailing employment or earning power."

The purpose of the Act is stated in *United States vs. Darby*, 212 U. S. 100, 85 L. ed. 609, to be:

> "The motive and purpose of the present regulations are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under *sub-standard labor conditions*, which competition is injurious to the commerce and to the state from and to which the commerce flows." (Emphasis supplied).

The Administrator had promulgated 35c as the rate in the lumber industry necessary to satisfy the requirements of the Act. This was the rate set out in the con-

tracts. This was the identical rate usually paid them when they were not stacking but were doing other work. Thus the contracts which stipulated 35c as the hourly rate with one and one-half for overtime hours fully complied with the Act.

Are the contracts to be condemned because they enable the worker by increased effort to make even *more* than that necessary to satisfy the Act?

Unquestionably if the company had abandoned the piece rate system and the contracts had provided for a 35c rate with one and a half that for hours over forty each week, and had stopped there with no guaranty they would have completely satisfied the Act. Should they be struck down because, while satisfying the requirements of the Act they go further and provide means by which the worker may, by using the hours to better advantage, take home an even larger pay check?

Without dispute stacking is not skilled work but is common labor. Clifton Holmes, (R. 50) when asked what kind of work he did stated, "Day laborer." Youngerman's testimony that stacking is common labor was not in any way controverted.

Under the contract the stackers *can* by exerting themselves make more than the amount they would on an hourly basis even with one and a half for overtime. Take for example a non-overtime week of forty hours. The hourly pay would be 40 x 35c or $14.00. But under the contract and taking the figure stated in petitioner's brief as the average hourly yield under the piece rate basis as 59c, the stacker by exerting himself under the incentive of piece rate pay would earn for a forty hour week 40 x 59c or $23.60 or more than half again as much as under the hourly basis and this for a *non-overtime* week.

It would seem to the reasonable mind that the con-

tracts providing for the worker's *time* by stipulating a certain amount to be paid to him for each *hour* he is on the job and for one and a half times that rate for each of those hours in excess of forty in each week would fully comply with the letter and the spirit of the Act and that this compliance would not be altered or destroyed by the fact that they also provide a way for the worker by incentive *effort* to earn even more.

No matter how slow they may drag they must in any event, under the contracts, be paid for their *hours* on the job and regardless of how little they do as long as they are kept in employment they are to be paid for their *time*. Whatever more the contract may offer in the way of incentive pay for increased *effort* measured by the amount of lumber stacked, the worker must in any event be paid for his *hours* both non-overtime and overtime on the basis required by the Act.

There is nothing in the Act to prevent an employer from paying *more* than the statutory minimum. Here the contracts provide for the payment of an additional amount not based on *hours*, but based on the amount of lumber stacked. This additional amount over and above the amount paid for their time was for their production. The Act does not prohibit incentive pay. Congress must have known that incentive pay was prevalent in industry and if it had intended to prohibit or even to discourage incentive pay systems appropriate words could have been found to so provide. That Congress did not intend to interfere with incentive systems is indicated by Section 202 b, "It is hereby declared to be the policy . . . to eliminate the conditions above referred to in such industries without substantially curtailing employment *or earning power*." (Emphasis supplied).

The contracts which in fact provide for a regular

rate and for one and one-half that for overtime on a *time* basis and thus fully satisfy the requirements of the Act should not be outlawed because they go even further and enable the workers to be paid for their effort measured by their production.

Although petitioner does not in so many words say that the contracts were made in bad faith, they are characterized as being "elaborate agreements" "signed with a mark" by "illiterate employees."

While the three employees who signed them are not educated men of letters their testimony given in answer to questions put, not by the attorneys, but by the court shows that they understood how they were to be paid under the contract. Clayton Carter did not testify, but the other two did. One of them, John Taylor, who had been working for the company twenty odd years (R. 63) was asked the following questions:

"The court: Well was the contract read to you?

"The witness: Yes, sir, I guess it was.

"The court: Did you think you understood it or not?

"The witness: I understood some of it . . ."

"The court: Well in the conversation yesterday did you understand that you were to get at least 35c an hour?

"The witness: Yes, sir.

"The court: And didn't you understand as to whether you would get more than that if you worked more than the prescribed hours per week?

"The witness: Yes, sir." (R. 64).

However unable to write this stacker may have been he had been working long enough to understand that he was to get at least 35c an hour and more if he worked more than the prescribed hours per week.

The other employee, Clifton Holmes, testified as follows:

"The court: Did you sign a written contract?

"The witness: Yes.

"The court: Was it read to you?

"The witness. Yes.

"The court: Do you think you understood it or not?

"The witness: Yes, sir, I understood some of it. I could not understand all.

"The court: Do you think you understood how you were to get paid?

"The witness: Yes."

Whether these employees signed their names by mark or otherwise would seem to be immaterial in view of the fact that in the *Belo* case the employees did not sign at all and the agreement was in the form of a letter written by the employer to the employees.

The chief criticism leveled at these contracts appears to be that the parties cannot by agreement stipulate the "regular rate" of hourly pay different from an amount arrived at by finding an average of pay for a previous period of time.

The "question presented" according to petitioner is "whether an employer who is in fact paying his employees piece rate yielding earnings of about 39c an hour (which in the footnote is stated to be "the average hourly piece work earnings . . . : calculated from the actual earnings . . . for the weeks in between April 1, 1943 and the date of the trial . . .") is excused from paying additional compensation for overtime calculated upon these earnings by contract which recites that 35c an hour is the "regular rate of pay" and "guarantees" earnings at the piece rate for "regular time and such overtime as the employee may work."

Petitioner charges that the 35c regular rate specified in the contract is "artificial" and "fictitious" and that

the 35c rate is not the regular rate of pay but is merely so "labeled."

Actually what was the regular rate of pay? Was it the average of all stackers for some period selected by petitioner as from April 1, 1943, and the date of the trial in September 1943 or was it the average of all of the employees during some other period or was it the average of each individual employee for some particular period or what was it? What could be more fictitious than a rate of pay arrived at by such a method or what could be more artificial? Under this system neither the employer nor the employee would know what the regular rate of pay would amount to until after enough weeks had been worked by enough workers so that an average could be figured. The employer would not know what amount to pay in a given week until that week and other subsequent weeks had been averaged so as to arrive at the average rate. This predicament was recognized in the *Belo* case when the court with reference to the Administrator's interpretation wrote: "And inasmuch as it cannot be calculated until after the work week has been completed, it is difficult to say that it is "regular" in the sense that either employer or employee knows what it is or can plan of the basis of it."

The statute specifies the overtime rate as "a rate not less than one and one-half times the regular rate at which he is employed." But "regular rate" is not defined in the statute. What was written in the *Belo* case applies here: "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationship to which the act would apply was so

various and unpredictable. And that which it was unwise for Congress to do this court should not do."[8]

In the absence of a definition of "regular rate" in the statute it is reasonable to suppose that Congress intended that parties should, as before, be permitted to agree upon the regular rate of pay.

In the *Belo* case the court wrote:

> "But it is agreed that as a matter of law employer and employee may establish the regular rate by contract."

The dissenting opinion in that case concedes this by stating:

> "The court's interpretation that, in the absence of bad faith, any form of contract which assures the payment of the minimum wage and the required overtime applied with the act may be assumed correct."

The basis of the minority opinion in the *Belo* case appears to be that hourly rates agreed upon there as regular rates were artificial and fictitious as contended for by the Administrator.

The majority of the court in the *Belo* case held that the agreement for the hourly rate with a guarantee of a minimum of $40.00 for the week's work was not artificial.

In the case at bar the agreement of 35c an hour is in no sense "fictitious" or "artificial" because here we have common laborers whose *actual* hourly rate of pay most of the time when they were doing work other than stacking was 35c an hour. This is a fact established by the petitioner's own Exhibit 1 (R. 115).[9]

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8 *Walling vs. Belo*, 316 U. S. 624, 86 L. ed. 1716.

9 For example, during the week ending March 7, Bob Noye, one of the stackers, did mill work for six hours and was paid six times 35c or $2.10. For the week

How in the face of these facts can it be said that these employees who were paid 35c an hour for one type of common labor in the mill were paid an "artificial" or "fictitious" rate when they agreed to 35c an hour for another type of common labor, namely, stacking?

But petitioner condemns the contracts because the contracts "would enable respondent to pay the specified piece rate uniformly during all *hours* worked, without higher rates for overtime employment." But that is not true. The piece rate basis has no *time* element involved. The piece rate basis involves only pieces of lumber put in place. The 80c for a thousand board feet of lumber flat stacked is, as the words imply, for that much lumber put into a particular position without respect to any time element whatever, and it is in that respect a matter not of counting hours but of counting pieces of wood. When it comes to the matter of counting *hours* the contract specifies how those hours are to be paid for. It is not a question of paying "specified piece rates uniformly during all hours" but a matter of paying for non-overtime hours and for overtime hours on the rates specified plus an additional amount *not* for piece rate *hours* but for piece rate *results* accomplished.

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ending March 14th another one of the stackers, Rochelle, Lamar, doing work in the mill was paid 35c an hour, both for that week and the following week, and again during the week ending March 28th. (R. 115). Then again (R. 116) Joe B. Hauser and Rochelle Lamar are shown to have worked doing mill work at 35c an hour. Joe B. Hauser is shown during the weeks ending June 20th and June 28th as doing work not indicated as mill work at 35c per hour. Record page 117 shows Eugene Cole doing mill work during the week ending October 10th at 35c an hour and likewise the week ending October 17th. It also shows John Taylor and Clifton Holmes doing mill work during the week ending October 31st and received 35c per hour for their work. Again (R. 118) the tabulation shows Lorenza Poon during the week ending December 5th being paid 35c per hour, and the same applies to Jan Hauser for the week ending December 5th as well as for the week ending Decembr 26th and Lorenza Poon again for the week ending December 19th and December 26th, being paid on the basis of 35c an hour. The same is true on into 1943.

The facts here make even a stronger case than in the *Belo* case. There it was a contract to pay a stipulated rate per hour for straight time and one and a half that amount for overtime with a guarantee of not less than $40.00 a week. Here it was a contract to pay a stipulated rate per hour for straight time, one and a half times that amount for overtime, with a guarantee of a sum not less than a stipulated total arrived at by multiplying the amount of lumber stacked by an agreed amount for a thousand board feet.

Certainly if an employer can agree with his employees for a specified hourly rate of pay for one and a half times that amount for overtime hours and a guarantee of at least $40.00 for a week, and be in compliance with the overtime provision of the Act, then surely an employer who makes the same agreement with reference to hours and overtime hours but who agrees to pay an additional amount based on the number of board feet stacked is all the more in compliance especially where the hourly rate instead of being arrived at by dividing the guaranteed weekly amount of $40.00 by 60, as in the *Belo* case, specifies as the "regular rate" the actual hourly rate which those identical employees receive when they cease one kind of common labor, namely, stacking, and do some other kind of common labor all at the same mill.

What the court was holding in the *Belo* case was that the parties are permitted in good faith to agree as to the *hourly* rate and having done so with the provision for one and a half that rate for overtime the employer is allowed to pay even more than that amount without violating the Act.

The difference between the majority and minority opinions in the *Belo* case actually is that the majority were willing to accept the arrangement as made in good

faith in order to comply with the Act, while the minority were unwilling to accept it.

The principle of the *Belo* decision written by a member of the Court who has gained even additional honor and distinction in his further service to the nation in a critical period, and which has been followed in any number of cases, and affirmed by inference in the *Helmerich*[10] case should not be discarded or overruled.

There would be far more justification for contending that the hourly rate was "artificial" or "fictitious" where it was arrived at by the arbitrary method of dividing the guaranteed weekly wage by 60, as was done in the Belo case than in the instant case where no such method was used but the specified hourly rate was the actual hourly rate paid to those identical individuals when they were not stacking but doing other work around the mill.

In *Atlantic Co. v. Walling*, 131 F2 518 (CCA 5, 1942) the court wrote:

> "The Belo case, however, made it equally clear that where there was a definite and fixed agreement that the compensation was being paid under, and in accordance with, the act, and there was an apportionment of it between base pay and overtime, it was to write, and not to construe, the statute, to hold that the parties had not done what they had agreed they were doing, establish a regular weekly rate and a rate for overtime of at least one and one-half times that rate."

In *Shipler v. Crucible Fuel Company*, (DC Pa. 1943) 6 Labor Cases, Sec. 61,444, an employer adjusted his compensation to meet the minimum require-

10 *Walling v. Helmerich & Payne*, 323 U. S. 37, 89 L. ed. 1

ments of the act by computing former monthly salaries on an hourly basis and contracts of employment providing for a specified regular rate of base pay were signed. The court cited the Belo case and held that "Under the Fair Labor Standards Act, the parties may legally agree upon the regular rate to be paid by the employer to the employee, so long as that rate equals, or exceeds, the minimum required by the Act."

In *Walling v. Emery Wholesale Corporation*, (DC, Ga., 1943) 49 F. Supp. 192 Affirmed 138 F (2) 548, it was held that employment contracts which provided for payment of an hourly rate equal to the statutory minimum, one and one-half times the hourly rate for hours worked in excess of the statutory minimum, and a gratuitous bonus to assure employees of receiving the same amount as their former weekly salaries in weeks when they did not work enough hours to earn weekly salaries equal to their former salaries, and employment contracts which provided for payment of an hourly rate higher than the statutory minimum, one and one-half times that rate for hours worked in excess of the statutory maximum, and stipulated weekly advances equal to the employees' former salaries because of the weekly variance in compensation due to irregular hours, were in compliance with the Act.

These cases support the proposition that the parties may legally agree as to what shall be the "regular rate."

The Missel case[1] cited by petitioner has no application here because there it was a simple case of a fixed weekly wage with no hourly rates specified and, therefore, no provision for the multiplication of the hourly rate by one and a half for overtime hours.

The *Helmerich* case cited by petitioner has no appli-

[1] *Overnight Motor Transportation Company vs. Missel*, 316 U. S. 572, 89 L. ed. 1682.

cation here because that case involves the payment of a specified amount for an eight hour shift or tour with the arrangement that each of these eight hour shifts would involve both regular pay and overtime pay and left no room for application of the forty hour ceiling specified in the Act. The forty hour ceiling was disregarded in the *Helmerich* case but in the case at bar it is expressly recognized. The *Helmerich* case involving the split day plan is condemned by the court as involving "ingenious mathematical manipulations" and "as being unrealistic and artificial" and "as fictitious." None of this could be said about the contract in the case at bar which uses as a regular rate the actual rate of 35c which the workers were paid when doing work other than stacking work which provides for one and a half times that amount for all hours over forty and the agreement to pay an additional amount based on incentive does not destroy or dissolve the obligation to pay for the time and overtime hours.

The *Helmerich* case is not similar in its facts or in principle and is no way controlling here. The fact that this court distinguished the *Helmerich* case on its facts from the *Belo* case serves to reaffirm the principle of the *Belo* case.

With reference to the contention that the purpose of the contract was to permit the employer to continue to pay on the same piece rate basis as before, what was written in the *Belo* case applies here:

> "It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously.

so long as the new rate equals or exceeds the minimum required by the Act."

"But the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the Act."

In the *Belo* case it is also stated as follows:

"When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."

"This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day."

If it was necessary for the District Court to decide whether the contracts conform to the Act it is submitted that they did so conform in providing by agreement for a regular rate, a rate of pay for *hours* which was not in any sense "fictitious" or "artificial" or a mere "label" rate but which was the rate promulgated for the industry and was the rate actually paid these identical individuals when they were doing work other than stacking and in further providing for one and one-half that rate for hours over forty.

Whether the District Court did or did not decide that question it certainly must have considered the contract as *bona fide* because it may be certain that if the court had concluded otherwise it would not have

held that the ". . . defendant has ceased such practices and has manifested a desire and willingness to fully conform to the provisions of the law."

The Circuit Court of Appeals held that under the undisputed facts there was "no necessity for an injunction to prohibit future violations" and while the court does not discuss the contracts the opinion is consistent only with the conclusion that that court considered them as *bona fide*.

The decision of the District Court was justified on the basis that these contracts were a bona fide arrangement entered into under the circumstances existing at the time and that they satisfied both the requirements of the Act and the practical necessities of the case with reference to the unwillingness of the stackers to work on an hourly basis.

Moreover the decision could, if necessary, be fully justified on the basis that the question as to the validity of the contracts would never arise unless there should *in the future* be overtime weeks. Whether or not there would be was a matter of conjecture. The fact that there were some during 1942 before notification would not mean that there would be more. The fact that there were some *pendente lite* under a temporary advance arrangement did not necessarily mean that they would continue. Having been brought into expensive litigation in order to satisfy the stackers' demands for a piece rate basis and having found that piece rate for non-overtime weeks was entirely legal, it might well be assumed that the defendant company would not subject itself to further trouble and expense by future overtime weeks.

The fact that the contracts provided for overtime does not, as contended by petitioner necessarily mean that there will be overtime any more than the fact that

an owner insures his house means that there will be a fire.

The tabulation (R. 120-121) shows that wages in the summer and fall of 1943 were increasing and had already increased to 40c and even 45c in some instances. If the court is to assume that there were later overtime weeks so as to bring the validity of the contracts into question it would be equally fair to assume that the pay based on the hourly rate in many instances exceeded the piece rate pay.

Regardless of what, if anything, the court may hold with reference to these contracts the fact remains without dispute that they were the result of an effort made in utmost good faith to comply with the provisions of a law which was new and which, in this respect, had not been construed by this Court.

Therefore, while taking the position that the contracts, if to be construed at all, should be construed as complying, nevertheless it is submitted that if the court should hold to the contrary, the fact remains that they were made in good faith in an honest effort to comply and even in that event the defendant company should not be stigmatized with an injunction.[12]

Even now, after the statute has been constructed it is not entirely clear just how overtime piece rate hours are to be handled. The only guide announced is that "such other modes must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether statutory requirements have been fulfilled." The court does not say that the total amount of pay, figured on the piece rate basis, must be divided by the total number of hours in order to get the "regular" rate of pay and that one and a half times

12 That an injunction does stigmatize a defendant as a law violator was recognized in *International Register Company vs. Recording Fair Register Company*, 151 Fed. 199

this amount is the overtime rate and certainly it does not say that the overtime rate is one and a half times the piece rate. Even the Administrator is not yet clear as to what the law is as is indicated in the brief on his behalf (brief page 9) where it is stated:

> "The Administrator has never been certain that this second method of payment is in strict compliance with the Act, and the Court's statement in the *Rosenwasser* case (p. 364) that piece work earnings must be reduced to an hourly basis for the purpose of determining compliance would seem to indicate, if read literally, that payment of one and a half times the applicable piece rate for each piece of work done during overtime hours would not constitute compliance with Section 7 if the employee completed fewer hours of work."

Even now, after the *Rosenwasser* case the Administrator himself is not entirely clear as to the law with reference to rate overtime.

Most of petitioner's argument is with reference to the effect of the contracts on overtime pay. The position taken is that an employer who had been paying piece rates which average 59c an hour is not "excused" from thereafter paying overtime based on that average by a contract providing that 55c an hour is to be the regular rate of pay. The parties cannot, therefore, agree to a rate less than the previous piece time average. The statute is thus rewritten so that Section 7 instead of providing that overtime is to be paid "at a rate not less than one and one-half times the regular rate at which he is employed" is to be changed to read, "at a rate not less than one and one-half times the average amount previously paid" or to make a special provision so that the statute with reference to piece rate employees so that

the statute would read, "at a rate not less than one and one-half times the average previously paid on a piece rate basis."

But the statute does not so provide. It does not say anything about any "average." Nothing in the Act indicates that Congress had in mind that overtime rates were to be based on some previous "average" nor is there anything in the Act to indicate that Congress intended to deprive the parties of the free right to contract as long as the amount was not below the minimum.

The policy declared is to correct "conditions detrimental to the maintenance of a minimum standard of living" and the freedom to contract was limited only to the extent stipulated.

The statute provides that overtime is to be calculated on the basis of one and one-half times the "regular rate at which he is employed." It did not say anything about average previous earnings which it might well have done if it had so intended. On the contrary the words used are "the regular rate at which he is employed" not the regular rate at which he had been previously employed or the average previously earned. The words, "at which he is employed" carry with them a recognition of the right to agree to employment rates instead of an intention to freeze the regular rate at an amount not less than a previous average.

Therefore, the answer to the question whether an employer is required to pay overtime compensation based on previous "average" earnings is that the statute does not so provide.

CONCLUSION

To summarize the argument here:

The entire good faith of the defendant company during the entire period is unquestionably established

by the findings of the district court. These findings are under Rule 52 (adopted by this court under the authority of Congress,) and such finding should not be set aside unless clearly erroneous.

That there were virtually no piece rate overtime weeks during the entire period between the inception date of the Act and the date the suit was filed except a relatively few in 1942 prior to notification is not only found by the district court to be a fact but is substantially what was agreed to be a fact in the stipulation signed on petitioner's behalf by no less than four of his attorneys. (R. 112-114).

The overtime piece rate weeks occuring during the six months intervening between the date the suit was filed and the trial date were found by the district court to be on an advance or temporary, *pendente lite* basis and that this was done in good faith and on advice of counsel has been admitted by petitioner's counsel in a brief filed in the Circuit Court of Appeals.

At the trial date, under the undisputed evidence, the *only* overtime piece rate weeks were those in 1942 before notice which stopped abruptly after the notice, and those handled on an advance basis, *pendente lite*, admittedly in good faith.

That there had, therefore, been relatively few overtime piece rate weeks and that those had been in good faith without intention to violate the Act is too well established for question.

The district court found *as a fact* that ". . . there is no necessity for an injunction to prohibit future violations."

The proof as to overtime piece rate weeks did not show any necessity for the issuance of an injunction to prevent future violations.

As to the future, the contracts served two purposes,

first, to show an end of the piece rate pay system without consideration of overtime hours and second, to show that if in the future there should be overtime hours they would be paid at one and one-half times the agreed hourly rate.

The contracts admittedly are valid under the Act as to non-overtime hours and their validity could come into question only if overtime hours should occur in the future, and that is a matter of pure conjecture insofar as this record is concerned.

If it would be fair for the court to assume that there would be future overtime weeks, it would be equally fair to assume that the generally increasing hourly rate as is reflected in the tabulation here, created many instances where the hourly rate which was already increasing to 40c and even 45c and may well have gone to 50c actually yielded an amount larger than that yielded by the piece rate basis thus adding additional reality to the agreement of the parties as to what should be the "regular rate."

If the validity of the contracts is to be decided by this court, it is submitted that they are valid because:

(1). The contracts specify as the "regular rate" the hourly rate promulgated by the petitioner, the very rate which was in fact in many instances actually paid to the selfsame individuals when doing mill work other than stacking, a rate not "artificial" or "fictitious" or a "label" rate but a rate actually paid as shown by petitioner's own Exhibit 1.

(2). The statute does not require that overtime be paid on the basis of the previous "average" hourly wage as translated from the piece rate basis but, subject to the minimum set out, parties are free to agree as to what shall be the regular hourly wage.

(3). The contracts provide for overtime hourly pay on the basis required by the overtime provisions of the

Act, and having thus complied with the hourly provisions of the Act, the contracts are not invalidated because they go further and provide for an additional amount based not on *hours* but on *effort* measured by the amount of lumber stacked because the Act does not prohibit wages in excess of those required and the declared policy of the Act is not to curtail earning power.

(4). Arrangements similar in principle but actually not as realistic have been approved by this Court in the *Belo* case where it was held in substance that parties can agree on a regular *hourly* rate for overtime and for an additional amount of pay based on a factor other than *hours* and the parties here agreed on a regular hourly rate for overtime and for an additional amount of pay based on a factor other than hours.

It is submitted that the district court acted in the proper exercise of its discretion in denying the injunction and that it should be affirmed.

Respectfully submitted,

FRED S. BALL, JR.,
Attorney for Respondent.

April 1943.

SUPREME COURT OF THE UNITED STATES.

No. 955.—October Term, 1944.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,
vs.
Youngerman-Reynolds Hardwood Company, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 4, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

The respondent corporation manufactures lumber for shipment in interstate commerce, employing various men to pick up and stack boards. Prior to the trial in this case these stackers were compensated at agreed piece rates per thousand board feet ricked or stacked. The Administrator of the Wage and Hour Division of the Department of Labor brought suit to enjoin alleged violations of the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938[1] in connection with these stackers. On the day before the commencement of the trial in the District Court the respondent ceased to use the allegedly illegal mode of piece rate compensation and entered into new and more elaborate wage agreements with the stackers. Following the trial the District Court dismissed the complaint and the Fifth Circuit Court of Appeals affirmed the judgment. 145 F. 2d 349. We granted certiorari because of important questions as to whether the new wage agreements comply with the requirements of Section 7(a) of the Act.

First. The District Court found that even though the former piece rate agreements be considered unlawful the respondent had no apparent intention of resuming their use. It also found no willful intention on the part of the respondent to violate the Act and no evidence of any intention of future violations. It therefore felt that there was no necessity for an injunction. While "voluntary discontinuance of an alleged illegal activity does not

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43, it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments.

At the same time, however, the validity of the new wage agreements was also at stake. These agreements on their face contemplated future hourly payments at regular and overtime rates as well as additional piece rate payments. Since the Administrator's complaint alleged generally that the respondent was violating Sections 7 and 15(a)(2) by employing its stackers on a piece work basis for more than 40 hours a week without compensating them for overtime at one and one-half times the regular rate, the question as to whether the new contracts satisfied Section 7(a) was properly in issue. Upon proof that these new provisions did not comply with Section 7(a) the Administrator was therefore entitled to an injunction absent any recognized mitigating factor. Evidence on this matter was introduced at the trial and the two courts below considered the contracts thoroughly, predicating their judgments in part upon the belief that the agreements did comply with Section 7(a). We accordingly turn to a consideration of that question.

Second. For approximately six months immediately preceding the trial the stackers were paid piece rates of 60 cents per thousand board feet ricked and 70 cents per thousand board feet stacked. During this period they earned at these rates an average of 51 cents an hour. Under the new contracts made on the day before the trial, however, they were compensated according to the following provisions:

"The basic or regular rate of pay is 35 cents per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:

"The amount of stacking done by said employee shall be figured on the basis of 80 cents per thousand board feet of lumber for flat stacking and 70 cents per thousand board feet of lumber ricked."

Using by way of illustration the labor performed and the hours worked during the six-month period preceding the trial, the Administrator points out that under the new guaranteed piece rates of 70 and 80 cents per thousand the stackers would earn an average of about 59 cents an hour for all hours actually worked, including those in excess of the statutory maximum. On the basis of the contract "regular rate" of 35 cents an hour,[2] on the other hand, the excess hours would yield the stackers only 52½ cents hourly. It is thus apparent that the guaranteed piece rates would yield greater returns on an hourly basis for both regular and overtime work and that they would actually be the rates paid.

The respondent argues that these contract provisions satisfy Section 7(a) since they provide for a "regular rate" of 35 cents an hour and for payment of one and one-half times that rate, or 52½ cents, for all overtime hours. Inasmuch as the Act does not forbid incentive pay or compensation above and beyond the statutory requirements it is urged that the additional payments resulting from the operation of the guaranteed piece rates are unaffected in any way by Section 7(a). We cannot agree, however, that this scheme of compensation is obedient to this statutory mandate.

Under Section 7(a) an employer is required to compensate his employees for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed. Thus by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, Section 7(a) achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577-578; *Walling* v. *Helmerich & Payne*, *supra*, 40; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, slip opinion, p. 5 (May 7, 1945).

The keystone of Section 7(a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance.

As we have previously noted, the regular rate refers to the hourly rate actually paid the employee for the normal, non-over-

[2] At the time these contracts were made the minimum wage for the timber products industry had been fixed at 35 cents an hour in an order issued by the Administrator.

time workweek for which he is employed. *Walling* v. *Helmerich & Payne, supra,* 40; *United States* v. *Rosenwasser,* 323 U. S. 360, 363. In the case of piece work wages, this regular rate coincides with the hourly rate actually received for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked. See *Overnight Motor Co.* v. *Missel, supra,* 580. As long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire. *United States* v. *Rosenwasser, supra.* "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne, supra,* 42. The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" in the wage contracts.

Here it is established that under the new wage agreements the stackers will receive 70 or 80 cents per thousand board feet ricked or stacked. Translated to an hourly basis, this means that they will receive approximately 59 cents per hour for both regular and overtime hours.[3] That amount is guaranteed them under the terms of the contracts and accurately mirrors all payments that they normally will receive from the respondent during the workweek. This 59-cent figure is therefore the average regular rate at which the stackers are employed. The individual regular rate which must be used depends, of course, upon the number of hours worked and the wages received by each stacker during the particular workweek in question. But such a rate is the one that must enter into any calculations of overtime payments due under

[3] This 59-cents an hour average is based upon a six-month study of work actually done by the stackers and there is no substantial basis for assuming that it is incorrect or that the average is likely to vary appreciably in the future.

Section 7(a). Insofar as the wage agreements failed to provide for the payment of one and one-half times this regular rate for all overtime hours they plainly violated the requirements of Section 7(a).

The 35-cent per hour "regular rate" fixed by the contracts is obviously an artificial one, however bona fide it may have been in origin. Except in the extremely unlikely situation of the piece work wages falling below a 35-cent per hour figure, this "regular rate" is never actually paid. In the normal case where the stackers earn more than 35 cents per hour on the piece rate basis during non-overtime hours, they are guaranteed this higher figure and are actually so compensated. And even when the stackers work overtime they actually receive at the present time an average of 59 cents an hour under the guaranteed piece rate system rather than one and one-half times the 35-cent "regular rate."

The 35-cent figure thus does not constitute the hourly rate actually paid for the normal, non-overtime workweek. Nor is it used as the basis for calculating the compensation received for overtime labor. It is not in fact the regular rate under any normal circumstances. And reliance upon it to prove compliance with Section 7(a) only allows respondent to escape completely the burden of a 50% premium for the hours so worked and prevents the stackers from receiving the benefits of such a premium as Congress intended. Thus by a mere label respondent would be enabled to nullify all the purposes for which Section 7(a) was created. We are unable to perceive any reason for sanctioning that result.

This Court's decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, lends no support to respondent's position. The particular wage agreements there involved were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees.

The judgment of the court below is reversed with directions to remand the case to the District Court for further proceedings consistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 956—October Term, 1944.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *vs.* Harnischfeger Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 4, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Here, as in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, decided this day, we are concerned with the problem of whether a particular type of wage agreement meets the requirements of Section 7(a) of the Fair Labor Standards Act of 1938.[1]

Respondent is a Wisconsin corporation engaged in producing electrical products for interstate commerce. About one-half of respondent's production employees, called incentive or piece workers, are involved in this case.

As a result of collective bargaining by their union, these employees entered into a collective agreement with respondent whereby they are each paid a basic hourly rate plus an "incentive bonus" or "piecework earnings". The various jobs performed by these incentive workers are "time studied" by the management. The time which the job is shown to consume is multiplied by a "standard earning rate"[2] per unit of time. The amount so obtained is known as the "price" placed on that job. When an employee is given work on a job that has been so priced, he receives a job card bearing the price.

The worker is paid his agreed base or hourly rate (ranging from 55 cents to $1.05 per hour) for the time which he takes to perform the job. If the job price exceeds this base pay, he ultimately receives the difference between the two amounts. The excess of the job price over the hourly earnings is known as an "incentive bonus" or "piecework earnings." Thus the sooner a job is completed the greater will be this incentive bonus. When the job price is smaller than the hourly earnings the employee receives only the hourly rate for the time worked, being assured

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] The "standard earning rate" is the hourly rate of pay which workers in the Milwaukee, Wisconsin, district receive for that type of work. This "standard earning rate" is not the base rate of any worker in respondent's plant, nor is it the average hourly earned rate of any worker.

of that rate regardless of his efficiency or speed. About 98.5% of the incentive workers, however, work with sufficient efficiency and speed to earn compensation over and above their base pay. These incentive bonuses were found by the District Court to form about 22% of the total compensation received each pay day by these workers, exclusive of overtime payments, although respondent claims that the bonuses vary from 5% to 29% of each payroll.

On many jobs which have not been "time studied" the respondent has agreed to pay, and does pay, each incentive worker an hourly rate at least 20% higher than his basic hourly rate. And when an incentive worker is temporarily assigned to "non-incentive" work he is paid at least 20% more than his basic hourly rate. Moreover, vacation pay is based on an employee's average hourly straight time earnings over a three-month period and not on his base rate.

These incentive workers frequently work in excess of the statutory maximum workweek. For these extra hours they receive a premium of 50% of the basic hourly rate, which does not reflect the incentive bonuses received. Likewise, when incentive workers are working on jobs that have not been "time studied" or are temporarily doing "non-incentive" work they receive overtime pay on the basis of their basic hourly rates rather than on the 20% higher hourly rates actually paid them during the non-overtime hours.

The Administrator of the Wage and Hour Division of the Department of Labor brought this action to compel the respondent to comply with the provisions of Section 7(a) of the Act. In defense, respondent pointed to the provision in the collective contract to the effect that "the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee." The District Court held that the respondent was violating the Act by excluding from the computation of overtime the piece rates actually paid. 54 F. Supp. 326. The Seventh Circuit Court of Appeals reversed that judgment by a divided vote. 145 F. 2d 589.

Our attention here is focused upon a determination of the regular rate of compensation at which the incentive workers are employed. To discover that rate, as in the *Youngerman-Reynolds* case, we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek.

It is evident that all the incentive workers receive a guaranteed basic hourly pay as a minimum. As to those who receive no regular additional payments during their non-overtime hours the respondent complies fully with Section 7(a) by paying them one and one-half time the basic hourly rate for all overtime hours. But the vast majority of the employees do receive regular though fluctuating amounts for work done during their non-overtime hours in addition to their basic hourly pay.

(1) Those who receive hourly rates at least 20% higher than their guaranteed base rates clearly are paid a regular rate identical with the higher rate and the failure of respondent to pay them for overtime labor on the basis of such a rate is a plain violation of the terms and spirit of Section 7(a). No contract designation of the base rate as the "regular rate" can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7(a), are impossible of achievement under such a computation.

(2) Those who receive incentive bonuses in addition to their guaranteed base pay clearly receive a greater regular rate than the minimum base rate.[3] If they received only piece work wages it is indisputable that the regular rate would be the equivalent of the translation of those wages into an hourly rate. *United States v. Rosenwasser*, 323 U. S. 360. It follows that piece work wages forming only a part of the normal weekly income must also be an ingredient of the statutory regular rate. Piece work wages do not escape the force of Section 7(a) merely because they are paid in addition to a minimum hourly pay guaranteed by contract. Indeed, from another viewpoint, the incentive employees so compensated are in fact paid entirely on a piece work basis with a

[3] This is shown by the following example. An incentive worker is assigned a basic rate of $1 an hour and works 50 hours a week on 15 "time studied" jobs that have each been given a "price" of $5. He completes the 15 jobs in the 50 hours. He receives $50 basic pay plus $25 incentive pay (the difference between the base pay and 15 job prices). In addition, the worker receives $5 extra for the 10 overtime hours. This is computed on the basis of 50% of the $1 base rate, or 50 cents an hour premium. Actually, however, this worker receives compensation during the week at the actual rate of $1.50 an hour ($75 divided by 50 hours), and the overtime premium should be computed on that basis, giving the worker a premium of 75 cents an hour or $7.50 for the 10 overtime hours.

minimum hourly guaranty.[4] The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of Section 7(a). We cannot sanction such a patent disregard of statutory duties.

In this instance 98.5% of the incentive employees receive incentive bonuses in addition to their guaranteed hourly wages, demonstrating that such bonuses are a normal and regular part of their income. Once the parties agree that these employees should receive such piece work wages, those wages automatically enter into the computation of the regular rate for purposes of Section 7(a) regardless of any contract provision to the contrary. Moreover, where the facts do not permit it, we cannot arbitrarily divide bonuses or piece work wages into regular and overtime segments, thereby creating an artificial compliance with Section 7(a).

It matters not how significant the basic hourly rates may be in determining the compensation in situations where incentive bonuses are not paid. When employees do earn more than the basic hourly rates because of the operation of the incentive bonus plan the basic rates lose their significance in determining the actual rate of compensation. Nor is it of controlling importance that the respondent now pays a premium for overtime employment so as to make the overtime rate somewhat above the piece work earnings per hour.[5] Until that premium is 50% of the actual hourly rate received from all regular sources Section 7(a) has not been satisfied.

Respondent also points to the fact that the incentive bonuses are often not determined or paid until weeks or even months after the semi-monthly paydays, due to the nature of the "priced" jobs. But Section 7(a) does not require the impossible. If the correct overtime compensation cannot be determined until some time after the regular pay period the employer is not thereby excused from making the proper computation and payment. Section 7(a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances.

The judgment of the court below is reversed and that of the District Court is affirmed.

Reversed.

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[4] Thus, in the example given in footnote 3, the worker earns $75 during the week exclusive of the overtime premium. This $75 may be considered either (1) the amount received for completing the 15 "priced" jobs with a $50 minimum guaranty or (2) the sum of the $50 hourly pay and the $25 piece work pay.

[5] The overtime rate now paid amounts to about one and one-third or one and one-fourth the regular hourly rate of actual earnings.

Mr. Justice FRANKFURTER, concurring.

The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, does not prohibit employment at piece-work rates. It merely requires that piece-work earnings be converted to an hourly basis for determining the minimum and overtime requirements of that Act. *United States* v. *Rosenwasser*, 323 U. S. 360. Nor does the Act bar an agreement establishing an hourly "regular rate" that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstances of a particular employment, provided it is not a mere artifice unrelated to wage-earning actualities. *Walling* v. *Belo Corp.*, 316 U. S. 624; *Walling* v. *Helmerich & Payne*, 323 U. S. 37. Accordingly, the Fair Labor Standards Act does not preclude a wage agreement whereby piece-rate payments are related, fairly and not evasively, partly to regular hours of work and partly to overtime. Piece rates need not necessarily be so adjusted that they cannot fairly be designed as part of the overtime but must necessarily help "load" the regular hourly wage.

But a properly apportioned overtime function for piece work should be clearly indicated as such in the employment contract. No doubt a law which, while covering piece rates, speaks in terms of hourly rates presents difficulties both for those charged with the law's enforcement and for those under duty to obey it. But if a wage agreement is to escape the obvious arithmetic way of calculating hourly rates based on piece-work rates, by dividing the total earnings by the hours worked, it is not too much to require that the function of piece rates as an overtime factor, if such they be, be clearly formulated. The contract should leave no such dubiety as to the role of the piece rate to the regular hourly rate as the two arrangements before us. It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute.

Mr. Chief Justice STONE, dissenting.

I think the judgment in both these cases should be affirmed as to all piece work employees and in No. 956 the judgment should be reversed only as to employees working exclusively on the hourly wage basis.

The respondent in each of these cases has entered into a wage contract with its employees, which places in their pay envelopes a weekly wage in excess of the minimum hourly wage rate which the Fair Labor Standards Act prescribes for the work week of forty hours and the additional overtime hours which they work in each week. There is no contention that the contracts were not entered into fairly and in a good faith effort to satisfy all the requirements of the law and to provide the employees with a wage higher than the prevailing rate of pay for like hours of work, with time and a half for overtime. The contract involved in No. 956 was the result of collective bargaining between the respondent employer and the C. I. O. Union of its employees. Both employers and employees desire to continue the contracts, the employers because the employees are satisfied and labor disputes will consequently be avoided, the employees because they receive a larger wage than if they worked at prevailing hourly rates of pay with time and a half for overtime as the statute prescribes.

Under each contract the employees receive for the first forty hours of the work week a guaranteed minimum hourly wage which is equal to or greater than the minimum wage prescribed by the statute. For overtime they receive one and one-half times the hourly wage and in addition a bonus, the amount of which is dependent upon the amount of piece work which they do during the work week. The bonus constitutes an addition to the hourly wage, both regular and overtime, so that in fact the compensation both for time and overtime is greater than the statute requires. The only question involved in either case is whether there is anything in the Fair Labor Standards Act which compels the bonus payment to be added to the stipulated time and overtime hourly wage in any different proportions than the wage itself is distributed.

The Government concedes that the statute does not require respondents to put their piece-workers on hourly wage rates and that they may continue to pay piece work rates and comply with § 7 of the Fair Labor Standards Act, provided only that piece work earnings be "translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled." Such is the effect of our decision in *United States* v. *Rosenwasser*, 323 U. S. 360, 364.

The method of translation urged by the Government and adopted by the Court is to ascertain the average hourly rate of pay by dividing the total weekly piece work wage by the number of hours worked. The hourly rate thus obtained, multiplied by the total number of hours worked per week, plus one-half of the hourly rate multiplied by the number of work hours in excess of forty will, it is said, give the weekly wage which the Fair Labor Standards Act requires respondents to pay to their piece work employees. The adoption of this method in the present cases requires the payment of an additional amount as overtime compensation which, according to the Court's theory, is not compensated by the weekly piece work wage, however high it may be.

This conclusion is based on two mistaken assumptions. One is that the weekly piece work wage, however high, cannot be taken to include any of the wage differential which the Act requires to be paid for overtime hours. The other is that the statute requires that the employer, who pays to his piece time employees a lump sum weekly wage more than enough to pay the hourly minimum rate plus time and a half for overtime, must nevertheless treat the total wage as comprising only the hourly wage paid for all the hours worked, without including anything for overtime. In short, the contention is that the statute requires the distribution of the piece work bonus between the first forty hours worked and the overtime hours in such proportions as would violate the statutory requirement for the payment of an increased rate for the overtime hours. It thus excludes the possibility that the bonus could be distributed in proportions which would compensate the first forty hours at an hourly wage above the minimum statutory requirement and compensate for the overtime hours at one and one-half times that rate.

To ascertain whether the piece work rate can be lawful compensation for time and overtime for which it is paid, the court, like the government, starts with the assumption that it is unlawful, not because it is inadequate in amount but because the bonus was either not intended to be or cannot be taken to be an appropriate increase in the guaranteed overtime compensation, as well as an increase in the guaranteed, regular hourly rate of pay. By assuming that a wage, ample to satisfy minimum demands of the statute for time and overtime, is nevertheless intended to violate the statute by adding all of the bonus to the average hourly wage alone, the conclusion is reached that no increase in overtime com-

pensation has been paid from the bonus. The wage must therefore be correspondingly increased in order to give added compensation for overtime.

Undoubtedly one could translate a piece work wage into an hourly rate which would violate the statute by treating the piece work wage as compensating for the hourly rate without time and a half for overtime. But that has not been done by the parties here. Such is not the necessary effect of the bonus payment, and there is no ground for assuming that such was intended. The fact that the bonus is to be added to a guaranteed minimum hourly rate for both time and overtime would seem to establish the contrary. Certainly no employee under such a contract could doubt that its purpose and function is to pay him for time and overtime at a rate above the statutory minimum. Even though the bonus payments were not thus labeled, where a lawful end may be attained by a lawful means we are not free to assume that it was attained by unlawful means.

The purpose of the Fair Labor Standards Act was to insure to every worker to whom it applies a minimum hourly wage and a fifty percent higher wage for his overtime hours. It was not to force increases in wages paid for time and overtime which are already above the statutory minimum. One may search the statute and its legislative history in vain for any hint that employers who, like respondents, are paying in excess of the statutory minimum wage for time and overtime, are compelled to increase the wage merely because they have failed to label the pay envelope as containing the wage for both time and overtime.

The fallacy of the position now taken becomes apparent at once upon comparison of the following examples, in each of which the employee works fifty hours a week, ten of which being overtime must under the statute be compensated at an hourly wage rate of one and a half times that paid for the first forty hours.

Example 1: The employee works upon an hourly basis at the rate of $1.00 per hour. His wage, as the statute commands, would be $40.00 for the first forty hours of his employment and $15.00 for the ten hours of overtime at the statutory rate of one and one-half times the agreed hourly rate, making a total weekly wage of $55.00.

Example 2: The employment contract, as in the present cases, provides that the employer guarantee the payment of a fixed minimum hourly rate of pay equal to or greater than the statu-

tory minimum plus one and a half times that rate for overtime, plus such additional amount as the employee may earn on a piece work rate. If the guaranteed hourly rate were $1.00 an hour, and the employee's earnings at the piece work rate were $66.00, his wage would be the weekly guaranteed minimum of $55.00 plus the $11.00 piece work bonus at the piece work rate, or $66.00 in all. His weekly wage on the hourly basis would be calculated as follows:

Minimum $1.00 per hour for forty hours	$40.00
Bonus addition 20¢ per hour for forty hours	8.00
Guaranteed minimum overtime $1.50, ten hours	15.00
Bonus addition for overtime 30¢ an hour for ten hours	3.00
Total	$66.00[1]

It will be noted from Example 2 that the weekly piece work wage is sufficient in amount when "translated or reduced by computation" to pay an hourly rate of $1.20 an hour for the first forty hours of work, and $1.80 an hour for the remaining ten hours of overtime. The statute, see § 7, requires no more.

In Example 2, the guaranteed rate of $1.00 per hour and $1.50 per hour for overtime would satisfy every statutory requirement, even though no bonus were added to the weekly wage. It seems plain that the addition of the bonus does not involve the payment of an unlawful wage or any omission to pay the lawful wage. If the employer and employee can lawfully agree to work for $1.20 an hour for the first forty hours and for $1.80 per hour for the additional ten overtime hours, making $66.00, the weekly piece work rate, I can find nothing in the Fair Labor Standards Act or in the principles of fair dealing and common sense to forbid a contract by which the employee is paid the sum of $66.00 for a week's work of fifty hours, or any larger amount, for piece work done in the period of fifty hours.

No basis is suggested for saying that the employer in satisfying the overtime requirements of the statute must distribute a lump sum weekly piece work wage between the wage payable for the

[1] If a equals the hourly rate the following formula would apply to the fifty hour week in which the piece work wage is $66.00:

$$40\,a + 1\tfrac{1}{2}\,a \times 10 = \$66.00$$
$$55\,a = 66.00$$

a = $1.20, the hourly rate for forty hours.
$1\frac{1}{2}\,a$ = $1.80, the hourly rate for overtime hours.

first forty hours and that paid for overtime in such proportions as to render the wage contract illegal rather than in proportions which express the required statutory time and overtime wage relationship of one to one and one-half. There is nothing in the statute requiring the wage contract, the pay envelope, or the pay roll to designate separately the part of the weekly wage which is for the forty hours regular time and that portion which is paid for the additional hours of overtime. It is enough that the weekly wage is that mutually agreed upon in good faith, that it is intended to pay for time and overtime, and that it is sufficient in amount to pay for the first forty hours at a rate above the minimum wage prescribed by the statute and to pay for the overtime at one and one-half times that rate.

When, as here, the wage contract guarantees an hourly wage with one and a half times that rate for overtime, it is obviously just and reasonable and in conformity to the statute to divide the piece work bonus between the regular hours of work and the overtime hours in the same proportions. Under the formula adopted by the Court the employer could pay no piece work rate high enough to dispense with what is thought to be the requirement to increase the weekly wage in order to pay the wage differential for overtime for which, by hypothesis, no piece work rate of pay compensates. Thus a piece work rate which would pay to the employee a weekly wage sufficient to pay several times the minimum hourly rate prescribed by the statute for time and overtime would not be lawful without a wage increase to compensate for the overtime. Despite the government's assurance that the statute does not preclude employment on piece work rates, and our decision to that effect in the *Rosenwasser* case, *supra*, the goal of lawfulness could never be attained by the adoption of such a rate of compensation, since the piece work wage however great can never be regarded as including the wage differential for overtime even though the parties so agree.

All this is in flat contradiction to *Walling* v. *Belo Corporation*, 316 U. S. 624, in which we held that nothing in the Fair Labor Standards Act bars an employer from contracting to pay his employees minimum hourly rates for time plus one and a half times those rates for overtime in excess of the minimum statutory rates, with a lump sum weekly guaranty which in some weeks exceeds the wage at the stipulated hourly rate. There we held that the guaranteed weekly wage was compensation for overtime as well as for

regular time. We decided that the contract contemplated that the excess of the guaranteed weekly wage over the stipulated minimum at the hourly rate was to be so distributed as to recognize the wage differential for overtime, in such a way as to satisfy the statutory requirements, even though the wage contract did not explicitly so declare. 316 U. S. at 632. That case is controlling here. In the present case the "regular rate", within the meaning of § 7(a)(3) of the Act is, as in Example 2, the stipulated minimum hourly rate plus a part of the bonus, and the bonus is, as the wage contracts have treated it, an addition both to the regular rate and the overtime rate, which the statute permits.

Neither *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, nor *Walling* v. *Helmerich & Payne*, 323 U. S. 37, is applicable here. In the *Missel* case "there was no contractual limit upon the hours" which the employer could require the employee to work for the agreed weekly wage, and "no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage," 316 U. S. at 581. Hence the court was unable to say that the fixed weekly wage was intended by the parties to cover both base pay and fifty percent additional for the hours actually worked over the statutory maximum. In the *Helmerich* case, *supra*, no attempt was made by the employer to apply the asserted regular hourly rate to the first forty hours of the work week, the actual wage paid being greater. In consequence the overtime wage was less than one and one-half times the hourly wage in fact paid during the first forty hours of the work week. This was an obvious failure to comply with the overtime pay requirements of the statute.

Even though Congress could have compelled an increase in wages above the statutory minimum for time and overtime in the case of all employers who pay wages on the piece work basis, Congress has not done so by the Fair Labor Standards Act or adopted any policy penalizing employers who are so misguided as to add a bonus to a guaranteed lawful minimum hourly wage for time and overtime. It is not our function to prescribe wage standards or policies which Congress has not adopted.

Mr. Justice ROBERTS joins in this opinion.